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Michael Louis Corrado

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SEX OFFENDERS, UNLAWFUL COMBATANTS, AND PREVENTIVE DETENTION

MICHAEL LOUIS CORRADO*

This Article is about preventive detention—detaining people on grounds of dangerousness alone. I want to argue in this Article that unless the detainee is insane or unable to control her behavior, the threat of punishment should not be abandoned as a device for controlling behavior in favor of indefinite preventive detention. In particular I argue that this is even true in the case of terrorists and enemy combatants. I then argue that in spite of a series of recent cases expanding the right of legislatures to authorize preventive detention, it is still consistent with our jurisprudence to draw the line where I am suggesting. The recent Hamdi case really didn't address this point. Hamdi said: (1) that Congress had authorized detention of enemy combatants for the duration of the war in Afghanistan, but not for the duration of the war on terror; and (2) that Hamdi was entitled to a (very minimal) hearing to allow him to rebut the charge that he was in fact an enemy combatant. If he failed to rebut it, then the military could continue to detain him for the remainder of the war. The Administration, of course, was arguing that it should be left entirely in their hands to determine whether someone was an enemy combatant, and when would be a propitious time to release or try them, if ever. In other words, indefinite detention. The first rationale for the detention, one accepted by all courts, was to keep them from returning to enemy lines (on the administration's account, that would be any terrorist group anywhere in the world). The second, treated with more suspicion, was for interrogation. In the administration's view, whether someone should be given a trial (like Lindh) or detained (like Hamdi and Padilla) depended on how useful their information was to the government. The Court's ruling limited the government in two ways: it required an immediate minimal hearing; and it limited detention without trial to the remainder of the actual fighting in Afghanistan only. What the Court did not address, because it did not have to, was the constitutional question whether Congress COULD authorize indefinite detention if it had wanted to. I focus on that question here.

INTRODUCTION.....	78
I. RECENT JURISPRUDENCE ON PREVENTIVE DETENTION	85
A. <i>Salerno and Pretrial Detention</i>	85
B. <i>Foucha and Commitment of the Mentally Ill</i>	87
C. <i>Hendricks and the Detention of Sexual Predators</i>	90
D. <i>Zadvydas and the Detention of Undesirable Aliens</i>	93
E. <i>Crane and a Second Look at the Detention of Sexual Predators</i>	95
F. <i>Hamdi, Padilla, Rasul, and the Detention of Unlawful Combatants</i>	98
II. JUSTIFYING INDEFINITE DETENTION	100
A. <i>The Return of the Man Who Could Not Control His Behavior</i>	101
B. <i>Punishing the Man Who Could Not Control His Behavior</i>	105
C. <i>Detaining the Man Who Can Control His Behavior</i>	107
D. <i>Detaining Enemy Combatants</i>	110
III. CAN INDEFINITE DETENTION (OF ENEMY COMBATANTS) BE BANNED?	113
CONCLUSION.....	120

INTRODUCTION

In the recent *Hamdi v. Rumsfeld*,¹ *Rumsfeld v. Padilla*,² and *Rasul v. Bush*³ cases, the Supreme Court answered many but not all of the questions that were raised by the recently declared war on terror. One question not answered was this: to what extent may Congress authorize indefinite detention of citizens not convicted of any crime? Ronald Dworkin, in a recent article on the three cases, argues that:

[T]he justices' arguments provide the legal basis for a much more powerful conclusion than the Court itself drew—that the

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1. 542 U.S. 507, 124 S. Ct. 2633 (2004). Throughout the remainder of this Article, the Supreme Court Reporter is used for citations to *Hamdi v. Rumsfeld*, *Rumsfeld v. Padilla*, and *Rasul v. Bush* because pinpoint citations to the United States Reports were unavailable at the time of publication.

2. 542 U.S. 426, 124 S. Ct. 2711 (2004).

3. 542 U.S. 466, 124 S. Ct. 2686 (2004).

Constitution does not permit the government to hold suspected enemy combatants or terrorists indefinitely without charging and convicting them of crimes . . . unless they are treated in effect as prisoners of war.⁴

The burden of my argument is that the Court *should* come to that conclusion, but it is wishful thinking to suppose that the Court has already reached that conclusion or has even laid the legal basis for it. The Court decided that the Congress had not *in fact* authorized indefinite detention but only detention for as long as the war in Afghanistan should last.⁵ But precisely because it reached the conclusion that Congress had not authorized indefinite detention, it had no reason to reach the constitutional issue of whether Congress *could* authorize indefinite detention.

The central issue in *Hamdi*, the only one of the three cases that reached beyond jurisdictional issues,⁶ was whether in fact Congress had authorized the executive branch to detain Hamdi *without a hearing*.⁷ Hamdi claimed—or rather Hamdi's father, who filed the lawsuit, claimed—that the government intended to detain him indefinitely,⁸ and the government did not deny Hamdi's claim.⁹ The government, in fact, asserted both Article II authority in the President himself, and authority from Congress, under the Authorization for Use of Military Force ("AUMF"),¹⁰ for the power to detain unlawful combatants for as long as the war on terror

4. Ronald Dworkin, *What the Court Really Said*, N.Y. REV. OF BOOKS, Aug. 12, 2004, at 26.

5. *Hamdi*, 124 S. Ct. at 2641–42.

6. In *Padilla* the Court determined that the habeas action was brought against the wrong respondent. 124 S. Ct. at 2721–22. In *Rasul*, the only question was whether the U.S. Naval Base at Guantanamo Bay, Cuba, was within the jurisdiction of United States courts. 124 S. Ct. at 2698.

7. *Hamdi*, 124 S. Ct. at 2635.

8. *Id.* at 2636.

9. *Id.* "The Government contends that Hamdi is an 'enemy combatant,' and that this status justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process is warranted." *Id.* In its Brief, the government asserted that the detention might be indefinite but that didn't mean that Hamdi would never be released. Brief for the Respondents at 16, *Hamdi*, 542 U.S. 507, 124 S. Ct. 2633 (No. 03-6696) ("The military has made clear that it has no intention of holding captured enemy combatants any longer than necessary in light of the interests of national security, and scores of captured enemy combatants have been released by the United States or transferred to the custody of other governments.").

10. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2000 & Supp. 2002)).

lasted.¹¹ The Court did not reach the issue of direct executive authority to detain because, it believed, Congress had in fact authorized the detention.¹² In answer to the central question, however, the Court held that Hamdi was entitled to process permitting him to test the grounds of his detention.¹³ As to whether the AUMF authorized indefinite detention once that process was granted, the Court's answer is that it did not, at least not in the sense that detention might last as long as an indefinite war on terror.¹⁴ But the Court never even raised the issue of whether Congress *could*, under the Constitution, authorize the indefinite detention of those not convicted of crimes.¹⁵

The district court in *Padilla*,¹⁶ however, did reach that last issue. Judge Mukasey, of the Southern District of New York, traced the recent line of cases that carved out the constitutionality of indefinite detention:

[I]nsofar as the argument assumes that indefinite confinement of one not convicted of a crime is *per se* unconstitutional, that assumption is simply wrong. In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Court upheld Kansas's Sexually Violent Predator Act, providing for civil commitment of those who, due to "mental abnormality" or "personality disorder" are likely to commit sexually predatory acts See also *United States v. Salerno*, 481 U.S. 739, 748 (1987) . . . *Moyer v. Peabody*, 212 U.S. 78, 84 (1909) To be sure, the standard of proof in some of those cases may well have been higher than the

11. *Hamdi*, 124 S. Ct. at 2639.

12. The plurality of four so held, *id.*, and Justice Thomas's opinion concurred in that point. *Id.* at 2674 (Thomas, J., dissenting).

13. *Id.* at 2648 (majority opinion).

14. The Court *did* say it agreed "that indefinite detention *for the purpose of interrogation* is not authorized" under the congressional AUMF Resolution. *Id.* at 2641 (emphasis added). But the purpose of interrogation contrasts with the general purpose of keeping combatants out of the battle that the Court treats as the underlying reason for detention. *Id.* at 2641-42.

15. Justice O'Connor, speaking for a majority on this point, held that on remand Hamdi had to be given some meaningful and immediate opportunity to contest his detention. *Id.* at 2648-49. She also held that—whether or not section 4001a required explicit congressional authorization for detention, and whether or not that requirement applied to military detention (things the Court did not have to decide)—Congress had in fact explicitly authorized the detention in the AUMF, *id.* at 2639, understood in the light of "universal agreement and practice" as to the incidents of war. *Id.* at 2640 (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).

16. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), *aff'd in part, rev'd in part sub nom.* *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426, 124 S. Ct. 2711 (2004).

standard ultimately will be found to be in this case, but the point is that there is no *per se* ban.¹⁷

Judge Mukasey then went on to discuss *Zadvydas v. Davis*,¹⁸ wherein the Court limited detention for aliens awaiting deportation.¹⁹ Mukasey pointed out that the limitation was not intended to apply to the terrorist case before his court: “[T]he Court was careful to point out that the case before it did not involve ‘terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.’ ”²⁰

There remains room for disagreement as to whether, in the AUMF, Congress intended to give the President the power to detain indefinitely. But the more important issue is not one of statutory interpretation. It is the question whether Congress itself *has* the power to authorize indefinite detention of dangerous persons where there has not been a conviction, or on the other hand whether, as Judge Mukasey put it, there is a *per se* ban on such detention. In our history there is little precedent for indefinite detention of responsible individuals on grounds of dangerousness.²¹

The question I am raising does not concern habeas corpus, of course.²² My question is whether, once he has been given the minimal hearing that the *Hamdi* decision says habeas corpus requires,²³ a

17. *Id.* at 591.

18. 533 U.S. 678 (2001).

19. *Id.* at 689.

20. *Padilla*, 233 F. Supp. 2d at 591 (quoting *Zadvydas*, 533 U.S. at 696).

21. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 528 (E.D. Va. 2002), *rev'd*, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004). “This case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States without charges, without any findings by a military tribunal, and without access to a lawyer.” *Id.*

22. The Constitution does permit Congress to suspend the writ when “in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2. The very fact that provision is made for its suspension argues against the supposition that Congress might otherwise authorize detention without trial.

23. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648–49 (2004). *Hamdi* is a citizen, and so the ruling is limited to citizen-detainees. Such an individual “must receive notice of the factual basis for his classification, and a fair opportunity to rebut” the allegations supporting the classification. *Id.* at 2648. In other respects, however, the proceedings could be “tailored” to the case, so that, for example, hearsay might be admitted, and the burden might be put on the detainee to disprove the allegations underlying the classification. *Id.* at 2649. There is no mention of a right to silence, or to confront his accuser. The Court did hold that *Hamdi* “unquestionably” had the right to an attorney on remand. *Id.* at 2652.

combatant may be held for an indefinite period without trial before civil or military courts. But the questions are clearly related. Once upon a time, it seems, the privilege of habeas corpus could be assumed to eliminate the possibility of indefinite detention without trial.²⁴ One who was detained on suspicion of dangerous activity had to be brought before a court for a hearing and then speedily tried.²⁵ But that assumption has eroded over the last fifteen or so years, and Judge Mukasey has traced the erosion in Supreme Court cases that expand Congress's authority to authorize preventive detention.²⁶ *United States v. Salerno*²⁷ may be seen as the opening move—the “entering wedge.”²⁸ In *Salerno* the Court declared, over strong dissent, that detention for short periods for the purpose of regulating dangerous activity was not punishment and, hence, was permissible without trial and conviction.²⁹ In *Kansas v. Hendricks*,³⁰ the understanding of regulation was expanded to permit indefinite detention of those many consider “the vile and the worthless.”³¹

24. See *supra* note 22.

25. See U.S. CONST. amend. VI; *Moore v. Arizona*, 414 U.S. 25, 27–28 (1973); *Barker v. Wingo*, 407 U.S. 514, 536 (1972); *Smith v. Hoey*, 393 U.S. 374, 382 (1969).

26. See *supra* notes 17–20 and accompanying text. In *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, I define “pure” preventive detention as the detention of dangerous individuals who are responsible for what they do. See Michael Louis Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, 86 J. CRIM. L. & CRIMINOLOGY 778, 791 (1996). I will try to avoid the use of that location here. Preventive detention, as I use the term here, is simply the detention of dangerous individuals for the purpose of preventing future harm. Christopher Slobogin defines pure preventive detention slightly differently: “[A] deprivation of liberty that is based on a prediction of harmful conduct and that is not time-limited by culpability or other considerations (such as a pending trial).” Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 2 (2003).

27. 481 U.S. 739 (1987).

28. These are the words used by Representative Randolph, speaking about a bill proposed by President Jefferson that would have suspended the right to habeas corpus for just three months so that Jefferson might detain, without trial, several individuals charged with treason. Randolph, who was in other things an ally of the President, said on the floor of the House:

If the bill passes, we are told, it will be but temporary As to its three months' continuance, I consider that as one of the most objectionable features of the bill—as a bait to the trap; as the entering wedge. If it is made reconcilable to the interests and feelings of this House to pass it for three months, do you think we will then feel the same lively repugnance to it that we now do? No!

16 ANNALS OF CONG. 421 (1807).

29. *Salerno*, 481 U.S. at 746–47.

30. 521 U.S. 346 (1997).

31. Representative Randolph of Virginia said as well:

[T]here is no need of much exertion in behalf of good men. Attacks on the liberty of the people are . . . made always in the persons of *the vile and the worthless*. But

sexual predators.³² In *Zadvydas v. Davis*,³³ the Court suggested (but did not hold) that the same might apply in the case of terrorists.³⁴ If Judge Mukasey is right, these cases demonstrate that there is no per se ban on Congress's authority to order the indefinite detention of enemy combatants without trial.³⁵

Certainly the Court can go in that direction. It can expand its understanding of the Constitution to permit Congress to authorize indefinite detention in these cases once there has been process. But it doesn't have to go that way. The Court can, consistent with its decided cases, reach a conclusion of the sort that Dworkin is looking for.³⁶ The Court can decide that the Constitution does not permit the indefinite detention of those apprehended during wartime who have been neither convicted of a crime nor adjudged prisoners of war. That is the conclusion that must be reached on moral and political grounds, and it is consistent, I will argue, with the Court's precedent.

The argument of this Article proceeds like this: in Part I, I review the series of cases starting with *Salerno* that begin to expand the legislature's right to detain for the purpose of preventing future crimes. My question is, has the Supreme Court really said that legislatures have the right to authorize indefinite detention? *Salerno* was about pretrial detention. Traditionally, and still in some states, bail was denied only to insure the integrity of the criminal process.³⁷ The Federal Bail Reform Act of 1984 permitted denial of bail to prevent future crimes.³⁸ It was controversial for that reason, and several district courts and one circuit court struck it down.³⁹ It was upheld in the Supreme Court largely on the ground that it was not

when precedent is once established in the case of bad men, who like pioneers go before to smooth the way, good men tremble for their safety.

16 ANNALS OF CONG. 538 (1807) (emphasis added).

32. *Hendricks*, 521 U.S. at 363–64.

33. 533 U.S. 678 (2001).

34. *Id.* at 691.

35. See *supra* notes 17–20 and accompanying text. By “indefinite preventive detention,” I mean detention for more than a short period defined by some external event (which may be for as long as two or three years or more, as in the case of pretrial detention) without either trial on criminal charges or release.

36. See *supra* note 4 and accompanying text.

37. See *Bell v. Wolfish*, 441 U.S. 520, 536 (1979); *Gerstein v. Pugh*, 420 U.S. 103, 114–15 (1975); *Stack v. Boyle*, 342 U.S. 1, 4–6 (1951).

38. Bail Reform Act of 1984, Pub. L. No. 98-473, §§ 202–10, 98 Stat. 1837, 1976–87 (codified as amended at 18 U.S.C. §§ 3141–50 (2000)).

39. See *infra* Part I.A.

punishment and, therefore, not punishment without conviction.⁴⁰ It was only regulation—regulation of dangerous activity.

The other cases, more briefly: *Foucha v. Louisiana*⁴¹ seemed to take a step back. It said that someone who was “not guilty by reason of insanity” (“NGRI”), but had recovered his sanity, had to be released from commitment.⁴² This would have been no big surprise except that after *Salerno* the Court could have called it “regulation” and approved the continued detention (which would have been indefinite detention).⁴³ *Hendricks* went the other way again, approving indefinite detention for sexual predators, after they have served their penal sentences.⁴⁴ *Zadvydas* went back in the direction of *Foucha*, declaring that an undesirable and deportable alien could not be held indefinitely just because the Immigration and Naturalization Service could not find a country to deport him to; thus, no indefinite detention.⁴⁵ However, the Court did note that it was an open question whether indefinite detention might be acceptable for terrorists.⁴⁶ *Kansas v. Crane*⁴⁷ revisited the sexual predator question and said that although indefinite detention was acceptable there, it was only acceptable if the detainee was unable to control his behavior.⁴⁸ Finally came *Hamdi*, which I have already discussed.⁴⁹

I then in Part II try to come to some conclusion about what the right thing to do would be, independent of constitutional considerations. I begin with a theory of preventive detention that argues that “inability to control” is an incoherent notion, and that sexual predators can respond to punishment and should be punished only and not detained. I try to show that these arguments don’t work. I then turn to an alternative theory, which is that mere “undeterrability” is the criterion, and that not only should sexual predators be detained, but those who are sane and in control but so

40. *United States v. Salerno*, 481 U.S. 739, 746–47 (1987); see *infra* Part I.A.

41. 504 U.S. 71 (1992).

42. *Id.* at 73.

43. See *Salerno*, 481 U.S. at 747.

44. *Kansas v. Hendricks*, 521 U.S. 346, 356–57 (1997).

45. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

46. *Id.* at 691.

47. 534 U.S. 407 (2002).

48. *Id.* at 411–13.

49. The district court in the related *Padilla* case was the only court to discuss the question I am interested in, and relying on the line of cases I have just laid out determined that there was no per se ban on indefinite detention of enemy combatants. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 591 (S.D.N.Y. 2002), *aff’d in part, rev’d in part sub nom.* *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev’d*, 542 U.S. 426, 124 S. Ct. 2711 (2004).

committed to a cause that they do not fear death should also be detained. Terrorists are the obvious cases; the suicide bomber is the paradigm. I try to show that these arguments also don't work, and that this theory has unpleasant consequences. In the end I propose drawing the line at those who cannot conform to the law, including those not in control of their behavior.

In Part III I argue that the above thesis—which would block the indefinite detention of terrorists and enemy combatants, should Congress in a mood of fervent patriotism decide to go that way—is consistent with Supreme Court jurisprudence. I go back through the cases and show that, given what the Court has said so far, it is still open to the Court to find that such authority is just not in the Constitution.⁵⁰

I. RECENT JURISPRUDENCE ON PREVENTIVE DETENTION

Contemporary detention jurisprudence has developed across several contexts including pretrial detention, commitment of the mentally ill, and detention of sexual predators, undesirable aliens, and unlawful combatants. We begin by surveying the development of contemporary detention jurisprudence, from *Salerno* through the recent enemy combatant cases.⁵¹

A. *Salerno and Pretrial Detention*

In the early 1980s, Congress passed the Bail Reform Act of 1984.⁵² This statute required judges to deny release on bail if they were satisfied that the crimes the accused was charged with were serious, and that the accused was likely, while out on bail, to commit more crimes of that sort.⁵³ The period of detention was limited, in the

50. Congress can suspend the writ of habeas corpus, but for what I consider a well-defined period, not at the discretion of a presidential administration. The more important point is that the existence of that clause in the Constitution supports the view that Congress cannot otherwise deny someone the right to a criminal trial. See *supra* note 22 and accompanying text.

51. For contemporary discussion, see T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365, 369–73 (2002); Corrado, *supra* note 26, at 780–88; Adam J. Falk, *Sex Offenders, Mental Illness, and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment after Kansas v. Hendricks*, 25 AM. J.L. & MED. 117, 124–36 (1999); Slobogin, *supra* note 26, *passim*.

52. Bail Reform Act of 1984, Pub. L. No. 98-473, §§ 202–10, 98 Stat. 1837, 1976–87 (codified as amended at 18 U.S.C. §§ 3141–50 (2000)).

53. 18 U.S.C. § 3142(e).

nature of the thing, to the pretrial period.⁵⁴ The reach of the statute was limited in a number of other ways:

- Its application was limited to the most serious crimes.⁵⁵
- There had to be a prompt hearing to determine whether the accused would be detained.⁵⁶
- The government had to prove by "clear and convincing evidence" that the accused presented a specific threat to the community.⁵⁷
- The accused was to be held "to the extent practicable" in a facility separate from the regular prison population.⁵⁸

Most of the federal courts of appeal that considered the law upheld it as constitutional.⁵⁹ The Second Circuit, however, held that the law was unconstitutional, saying that the concept of substantive due process, embodied in the Fifth Amendment, "prohibits the total deprivation of liberty simply as a means of preventing future crimes."⁶⁰ In an opinion written by Chief Justice Rehnquist, the Supreme Court disagreed.⁶¹ In response to the defendant's argument that pretrial detention on the basis of dangerousness is impermissible punishment before trial, the Court declared that such detention was not punishment.⁶² Whether something is punishment, the Court argued, depends first upon whether it is intended as punishment.⁶³ If it was not intended as punishment, then it will not be considered impermissible if any other rational explanation for it can be found, so long as it is not excessive in relation to that explanation.⁶⁴ Congress did not intend this detention as punishment, but as "a potential solution to a pressing societal problem. There is no doubt that preventing danger to the community is a legitimate regulatory goal."⁶⁵

54. See *United States v. Salerno*, 481 U.S. 739, 747 (1987).

55. 18 U.S.C. § 3142(f).

56. *Id.*

57. *Id.*

58. *Id.* § 3142(i)(2).

59. See *United States v. Walker*, 805 F.2d 1042 (11th Cir. 1986); *United States v. Rodriguez*, 803 F.2d 1102 (11th Cir. 1986) (per curiam); *United States v. Simpkins*, 801 F.2d 520 (D.C. Cir. 1986) (per curiam); *United States v. Zannino*, 798 F.2d 544 (1st Cir. 1986) (per curiam); *United States v. Perry*, 788 F.2d 100 (3d Cir. 1986), *cert. denied*, 479 U.S. 864 (1986); *United States v. Portes*, 786 F.2d 758 (7th Cir. 1985).

60. *United States v. Salerno*, 794 F.2d 64, 71-72 (2d Cir. 1986), *rev'd*, 481 U.S. 739 (1987).

61. *United States v. Salerno*, 481 U.S. 739, 741 (1987).

62. *Id.* at 746.

63. *Id.* at 747.

64. *Id.*

65. *Id.* (citations omitted).

And the Court found that the detention was not excessive in light of the fact that it was limited to the pretrial period, which because of the Speedy Trial Act cannot be excessive, and that it was limited to the most serious crimes.⁶⁶ The Court conceded that every individual has a strong interest in the liberty guaranteed by the Constitution and called it a fundamental right. But where the government's interest is "sufficiently weighty," that right may "be subordinated to the greater needs of society."⁶⁷

In his dissenting opinion, Justice Marshall characterized the case as the first one in which the Court had to consider a statute "in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue," and said that the decision was contrary to "basic principles of justice."⁶⁸ Marshall also argued that by labeling the detention "regulation" rather than "punishment," the majority eviscerated one of the fundamental protections we have against the power of the state.⁶⁹

There is something right about Justice Marshall's dissent, as we will see. But he was wrong, as the majority pointed out, to characterize the detention as indefinite, since it was limited to the pretrial period.⁷⁰ And I think he was wrong to insist that the detention be labeled punishment. Whatever we think about permissibility of detention solely on grounds of future dangerousness, it is not punishment.⁷¹

B. *Foucha and Commitment of the Mentally Ill*

Someone who is tried for a crime may plead the affirmative defense of NGRI.⁷² While the details of the defense of insanity differ

66. *Id.*

67. *Id.* at 750–51.

68. *Id.* at 755 (Marshall, J., dissenting).

69. *Id.* at 760.

70. *Id.* at 747 (majority opinion).

71. See Corrado, *supra* note 26, at 779; see also Michael Corrado, *Punishment, Quarantine, and Preventive Detention*, 15 CRIM. JUST. ETHICS 4, 10 (1996). For an interesting discussion of the German way of allocating retribution and incapacitation, see Nora Demleitner, *Abusing State Power or Controlling Risk?: Sex Offender Commitment and Sicherungsverwahrung*, 30 FORDHAM URB. L.J. 1621 (2003).

72. See MODEL PENAL CODE § 4.01 (1985) (discussing mental disease or defect excluding responsibility); 21 AM. JUR. 2D *Criminal Law* § 47 (1998); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 338–39 (3d ed. 2001).

from jurisdiction to jurisdiction, many of the elements are the same.⁷³ If the jury acquits on grounds of insanity, the defendant will be confined to await a release hearing.⁷⁴ If, as is normally the case after an NGRI acquittal, he is found to remain mentally ill and dangerous, he will not be released. He will receive a release hearing periodically, but so long as he remains both mentally ill and dangerous, he may be detained indefinitely.⁷⁵

Some fifteen years ago a number of states tried to change the rules so that after acquittal, an offender would be released only if he proved that he was no longer dangerous.⁷⁶ That would mean that he would be detained if he remained dangerous, even if he were no longer mentally ill.⁷⁷ The result in the case of those who regained their sanity but remained dangerous would be indefinite preventive detention of the sane, or indefinite pure preventive detention. The question that arose, then, was whether such detention was constitutional.

Louisiana was one of the states to make this change in the rules.⁷⁸ The issue came before the Supreme Court in 1992 in *Foucha v. Louisiana*.⁷⁹ Foucha had been charged with aggravated burglary, but was found not guilty by reason of insanity and was committed to a state hospital.⁸⁰ When he later applied for release, release was denied under the new statute.⁸¹ Although it was found that he was no longer mentally ill, he remained dangerous to himself or others.⁸²

73. This is assuming that the jurisdiction *has* an insanity defense. There are a number of jurisdictions now where no insanity defense is available. See DRESSLER, *supra* note 72, at 358–59.

74. See MODEL PENAL CODE § 4.08 (1985) (discussing the legal effect of acquittal on the ground of mental disease or defect excluding responsibility, commitment, release, or discharge); 21 AM. JUR. 2D *Criminal Law* § 79 (1998); DRESSLER, *supra* note 72, at 352.

75. See *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992).

76. See David S. Wisz, *States' Rights to Confine "Not Guilty by Reason of Insanity" Acquittees after Foucha v. Louisiana*, 82 KY. L.J. 315, 336 (1994) (citing CAL. PENAL CODE § 1026.2(e) (West 1985); DEL. CODE ANN. tit. 11, § 403(b) (1987); HAW. REV. STAT. § 704-415 (1985); KAN. STAT. ANN. § 22-3428(3) (1990); MONT. CODE ANN. § 46-14-301(3) (1991); N.C. GEN. STAT. § 122C-268.1(j) (1991); VA. CODE ANN. § 19.2-181(3) (1990); WASH. REV. CODE § 10.77.200(2) (1990); WIS. STAT. § 971.17(4) (1991); IOWA R. CRIM. PROC. 21.8(e)).

77. E.g., N.C. GEN. STAT. § 122C-276.1 (1991) (providing for detention so long as the acquittee remained dangerous, whether or not he had recovered his sanity) (amended 1995).

78. LA. CODE CRIM. PROC. ANN. art. 657 (1981) (amended Supp. 1996).

79. 504 U.S. 71 (1992).

80. *Id.* at 73–74.

81. *Id.* at 74–75.

82. *Id.*

The Court struck down the statute under which Foucha was denied release.⁸³ The Court held that mere dangerousness was not enough by itself to justify his confinement in a mental institution.⁸⁴ It said, “[d]ue process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed Foucha is not suffering from a mental disease or illness. If he is to be held, he should not be held as a mentally ill person.”⁸⁵

Applying the notion of substantive due process to the issue of commitment, the Court said, “[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”⁸⁶ The Court agreed that the state may imprison convicted criminals for the purposes of deterrence and retribution but did not see any such punitive purpose in the detention of Foucha.⁸⁷ By acquitting him of the crime, the state exempted him from criminal responsibility. “As Foucha was not convicted, he may not be punished.”⁸⁸

The Court admitted that detention of dangerous persons who are not mentally ill is permissible under certain narrow circumstances, and it referred to *Salerno*, the pretrial detention case, as an example. In *Salerno*, the detention was limited in time, was limited to the most serious crimes, granted the accused certain procedural protections, and was narrowly focused on a particularly serious problem.⁸⁹ The Louisiana statute was not so constrained, so the Court struck it down.⁹⁰

In his dissent, Justice Thomas argued that although there may be an interest in liberty that is protected by the Due Process Clause, an interest is not the same as a fundamental right.⁹¹ There is no general fundamental right to freedom from bodily restraint that applies to all persons, according to Justice Thomas.⁹² “If convicted prisoners could claim such a right, for example, we would subject all prison sentences to strict scrutiny.”⁹³ Since freedom from physical restraint was not a

83. *Id.* at 86.

84. *Id.* at 82.

85. *Id.* at 79 (citations omitted).

86. *Id.* at 80.

87. *Id.*

88. *Id.*

89. *Id.* at 81.

90. *Id.*

91. *Id.* at 117 (Thomas, J., dissenting).

92. *Id.* at 118.

93. *Id.*

fundamental right in this case, Justice Thomas said, it should not be subjected to strict scrutiny.⁹⁴ Therefore, if the state has some reasonable explanation for why those who were acquitted by reason of insanity should continue to be detained, even after they become sane again, then the law should be upheld.⁹⁵ And there is a reasonable explanation in this case: the insanity defense might be misused. Those who are acquitted by reason of insanity might, in fact, not be insane.⁹⁶ To prevent this misuse of the defense, the state might want to detain them even after they can prove they are sane.⁹⁷

But according to the majority, the statute was unconstitutional. Although the Court did not say so explicitly, it evidently considered the right of Foucha to his freedom once he had regained his competence to be a fundamental right and the violation of this right not justified by the state's meager rationalization.

C. *Hendricks and the Detention of Sexual Predators*

Sexual crimes, especially those involving children, have gotten a great deal of attention and have produced a number of innovative, but constitutionally questionable, remedies over the last several decades.⁹⁸ For the purposes of our discussion of preventive detention, what is of interest is the type of statute that was at issue in *Kansas v. Hendricks*,⁹⁹ a statute that combines punishment with preventive detention for sexual offenders. Under statutes of this sort, someone who has committed a sexual crime and who qualifies as a "sexual predator" may, after he has served his prison sentence for the crime, be preventively confined for an indefinite period, until he is considered no longer dangerous.¹⁰⁰ The typical statute provides for

94. *Id.* at 119.

95. *Id.* at 111.

96. *Id.*

97. *Id.*

98. See KAN. STAT. ANN. § 59-29a01 (1994); MINN. STAT. ANN. § 253B.07(7)(a) (West 2003); TEX. HEALTH & SAFETY CODE ANN. § 841.005 (1989 & Supp. 2005); WASH. REV. CODE ANN. § 71.09.040(1) (2002 & Supp. 2005).

99. 521 U.S. 346 (1997).

100. There was an earlier period during which the states adopted "sexual psychopath legislation."

Starting in the 1950s, sexual psychopaths, however defined, were targeted for indefinite detention. Many of these offenders were not dangerous, but were considered socially deviant, and upon conviction were either sentenced or committed civilly. During the early- to mid-1990s, a number of states reinvigorated their civil commitment statutes for sex offenders, despite the criticism levied against earlier legislation . . . and its abolition during the 1970s.

Demleitner, *supra* note 71, at 1629–30 (footnotes omitted).

certain procedural safeguards. Under the Kansas statute, for example, the offender is entitled to counsel and to a hearing before a jury to determine whether he qualifies as a sexual predator.¹⁰¹

This application to the defendant of both punishment—implying that he is responsible for the crime—and preventive detention—implying that he is too dangerous to release—forces us to rethink our justification for commitment of the insane. If the defendant is responsible for his behavior, and thus may be punished, we cannot base our justification of his subsequent detention on the fact that he is dangerous and *unresponsible*. But if he is responsible and yet may be detained on grounds of dangerousness, how can we insist that the insane may be committed indefinitely *only if* they are both dangerous and insane, as we saw the Court do in *Foucha*?

Since the sexual offender will not usually be legally insane, commitment under the Kansas statute would be preventive detention, and the issue was whether it was constitutional. The Supreme Court of Kansas had struck down the statute.¹⁰² It had declared that substantive due process requires the state to prove by clear and convincing evidence that the person who is to be civilly committed is both mentally ill and dangerous.¹⁰³ The Kansas court certainly had reason to believe that such a conclusion followed from the substantive due process reasoning in the *Foucha* opinion, handed down just five years earlier.¹⁰⁴ Nevertheless, the United States Supreme Court reversed.¹⁰⁵ Justice Thomas, speaking for the Court, said once more

101. KAN. STAT. ANN. § 59-29a06. As far as procedural due process goes, the Kansas statute provides even greater procedural protections than those found in *Salerno*. If a court finds “probable cause” to believe that the offender is a sexually violent predator, there must be a professional evaluation. § 59-29a05; *Hendricks*, 521 U.S. at 352. If the evaluation supports the court’s conclusion, there will be a trial on the issue of dangerousness. § 59-29a06; *Hendricks*, 521 U.S. at 352–53. The offender is entitled to counsel, provided at the expense of the state if necessary. The trial is a full-fledged hearing, with a right to jury and a right to counsel (provided by the state if necessary). § 59-29a06; *Hendricks*, 521 U.S. at 352–53. The standard for a determination that the offender is a sexually violent predator is “beyond a reasonable doubt.” § 59-29a07(a); *Hendricks*, 521 U.S. at 353. On the other hand, detention under the sexual predator statute, unlike the detention at issue in *Salerno* but like the detention in *Foucha*, is intended to be indefinite, possibly for life. § 59-29a07(a); *Hendricks*, 521 U.S. at 353. The Court admitted: “A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment.” *Hendricks*, 521 U.S. at 358. There must be some additional factor, such as mental illness. *Id.* In *Foucha*, there was no mental illness, and consequently the statute in that case was struck down. 504 U.S. 71, 86 (1992).

102. *Hendricks*, 521 U.S. at 356.

103. *Id.*

104. See *supra* notes 83–90 and accompanying text.

105. *Hendricks*, 521 U.S. at 371.

what he had said earlier in dissent, that the "liberty interest is not absolute."¹⁰⁶ He remarked in particular on the right of the state to restrain those who were dangerous because they could not control their behavior.¹⁰⁷

Although the statute requires that those marked "sexual predators" must suffer from "mental abnormalities" or "personality disorders," it very frankly admits that "mental illness" sufficient for civil commitment is not required.¹⁰⁸ Those who are to be detained as sexual predators do not have a mental disorder that would make it possible to commit them under the state's civil commitment law.¹⁰⁹ Nevertheless, the sexual predator statute passes the "additional factor" test, although it does not require mental illness.¹¹⁰ As we have seen, the statute requires not only proof of dangerousness but also a "mental abnormality" or "personality disorder."¹¹¹ These statutory requirements limit indefinite confinement, according to the Court, to

106. *Id.* at 356.

107. *Id.* at 356-57.

108. KAN. STAT. ANN. § 59-29a01 (1994).

109. In the preamble to the statute the legislature says:

[A] small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general involuntary civil commitment statute] In contrast to persons appropriate for civil commitment under the [general involuntary civil commitment statute], sexually violent predators generally have anti-social personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure . . . is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the [general involuntary civil commitment statute].

Hendricks, 521 U.S. at 351 (omissions and alterations in original) (quoting KAN. STAT. ANN. § 59-29a01) (1991)).

110. *Hendricks*, 521 U.S. at 358.

111. See KAN. STAT. ANN. §§ 59-29a01 to 59-29a07. But see Demleitner, *supra* note 71, at 1657 (arguing that in Germany, "[a]t present, a finding of dangerousness might be sufficient to meet the abnormality standard"). Demleitner notes that the German *Sicherungsverwahrung* standard would be satisfied by an inclination to commit sexual crimes, and that considerations that have been suggested as lessening responsibility, such as "rotten social background," would seem to make the offender a good candidate for detention under German law. *Id.* at 1645 n.174, 1650-51.

those with “volitional impairment[s],” making it “difficult, if not impossible, for the person to control his dangerous behavior.”¹¹²

Justice Thomas also rejected *Hendricks*’s claim that he was entitled to the protections that the Constitution provides for criminal defendants.¹¹³ He remarked that the detention that *Hendricks* was subject to after his commitment was not punishment, and the proceedings that resulted in his commitment were not criminal proceedings.¹¹⁴ Justice Thomas, therefore, made the same argument that was made in *Salerno*: the aims of punishment are retribution and deterrence, and commitment under the statute does not serve either of those purposes.¹¹⁵ The Kansas statute is not retributive because it is based not on past crimes, but on future dangerousness, and it is not deterrent because sexually violent predators are not able to control their behavior, and thus cannot be deterred.¹¹⁶

If *Salerno* was the first step in expanding the modern doctrine of preventive detention of those responsible for their behavior, *Hendricks* was the second. According to *Hendricks*, indefinite confinement is justified if, in addition to being dangerous, the offender has a condition that makes it likely that he will not control his sexual behavior.¹¹⁷ The Constitution does not require a finding of legal insanity as a basis for indefinite detention. The tendency toward sexual crimes required by the statute is sufficient. This was not the end of the story about the detention of sexual predators. It remained unclear just how “inability to control,” “volitional impairment,” and “likely to engage in sexually violent behavior” are related and are to be understood. A second chapter was waiting to be told. Meanwhile, the question of indefinite detention of undesirable aliens faced the Court.

D. *Zadvydas and the Detention of Undesirable Aliens*

The issue in *Zadvydas v. Davis*¹¹⁸ was the indefinite detention of undesirable aliens who could not be deported to another country.¹¹⁹ The problem was this: if someone were found to be an undesirable alien subject to deportation, and the government could not find a

112. *Hendricks*, 521 U.S. at 358.

113. *Id.* at 360–61.

114. *Id.*

115. *Id.* at 361–62.

116. *Id.* at 362–63.

117. *Id.* at 363–64.

118. 533 U.S. 678 (2001).

119. *Id.* at 682.

country that would accept him, the government would have to keep him detained until such a country could be found (and thus perhaps indefinitely), or the government would have to release him into the general population.¹²⁰ The Immigration and Naturalization Service read the relevant legislation to authorize indefinite detention under those circumstances.¹²¹

The Supreme Court upheld the statute, but only after interpreting it to *not* permit indefinite detention.¹²² Justice Breyer, speaking for the Court, emphasized the fundamental nature of the right to freedom from physical restraint:

A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "deprive" any "person . . . of . . . liberty . . . without due process of law." Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.¹²³

Detention is permissible to prevent the most serious crimes, where there are strict judicial safeguards and "stringent time limitations," as in *Salerno*.¹²⁴ But indefinite detention under the deportation statute would not be limited in time and would not be limited to those likely to commit the most serious crimes. Furthermore, the only procedures available to those detained under the deportation statute are administrative procedures without judicial review. There is a constitutional presumption against permitting administrative tribunals to make decisions affecting fundamental rights.¹²⁵ Furthermore, the deportation proceeding is not criminal, the Court said: it has no punitive intent, and it has clear regulatory

120. *Id.*

121. *Id.* at 683–86.

122. Justice Breyer said that if Congress had clearly intended to make indefinite detention possible, "we must give effect to that intent." *Id.* at 696 (citation omitted). But then the statute would have to be struck down as inconsistent with due process and the fundamental right to freedom from physical restraint. Thus, "interpreting the statute to avoid a serious constitutional threat, we conclude that, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 699.

123. *Id.* at 690 (alteration in original).

124. *Id.* at 691.

125. *Id.* at 692 (stating that "[t]his Court has suggested, however, that the Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights' ") (quoting Superintendent, Mass. Corr. Inst. at *Walpole v. Hill*, 472 U.S. 445, 450 (1985)).

intent.¹²⁶ Detention is also permissible where, in addition to dangerousness, a special justification, such as mental illness or a tendency to commit sexual crimes, outweighs the individual's liberty interest.¹²⁷ But no such justification is available in the immigration case.¹²⁸ Indefinite detention, therefore, has no reasonable connection to the regulatory purpose of the deportation statute.¹²⁹

The Court did mention two significant questions left undecided by this ruling. The first was the question of *admission* of aliens into the United States, rather than the ejection of undesirables.¹³⁰ The second, more important for our story, has to do with terrorism: "Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."¹³¹

This observation is the basis for the use Judge Mukasey put *Zadvydas* to in his opinion in *Padilla*, mentioned in the introduction.¹³²

E. Crane and a Second Look at the Detention of Sexual Predators

In *Kansas v. Crane*¹³³ the Supreme Court revisited the Kansas sexual predator statute.¹³⁴ The case had gone up through the Kansas state courts. Crane had been convicted of a sex crime.¹³⁵ Whether or not he could be confined under the statute depended on the interpretation of the holding in *Hendricks*.¹³⁶ Crane claimed that he did not lack the ability to control his sexually violent behavior, and therefore, was not a sexual predator under the interpretation imposed upon the statute in *Hendricks*.¹³⁷ The State argued that *Hendricks* did not require an inability to control sexually violent behavior but only a condition that made such behavior likely.¹³⁸ The state supreme court

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 690–91.

130. *Id.* at 692–93.

131. *Id.* at 696.

132. See *supra* notes 17–20 and accompanying text.

133. 534 U.S. 407 (2002).

134. *Id.* at 409.

135. *Id.* at 411.

136. *Id.* at 409.

137. *In re Crane*, 7 P.3d 285, 290 (Kan. 2000), *vacated*, *Kansas v. Crane*, 534 U.S. 407 (2002).

138. *Crane*, 534 U.S. at 409.

shared Crane's understanding of *Hendricks* and reversed his committal.¹³⁹

The United States Supreme Court agreed with the State that *Hendricks* had not required an *absolute* lack of control.¹⁴⁰ Otherwise, though, it agreed with Crane and the Kansas court:

We do not agree with the State . . . insofar as it seeks to claim that the Constitution permits commitment of the type of dangerous sexual offender considered in *Hendricks* without *any* lack-of-control determination. *Hendricks* underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." That distinction is necessary lest "civil commitment" become a "mechanism for retribution or general deterrence"—functions properly those of criminal law, not civil commitment. The presence of what the "psychiatric profession itself classifie[d] . . . as a serious mental disorder" helped to make that distinction in *Hendricks*. And a critical distinguishing feature of that "serious . . . disorder" there consisted of a special and serious lack of ability to control behavior.¹⁴¹

Justice Scalia was joined in dissent by Justice Thomas, who had written the majority opinion in *Hendricks*.¹⁴² Scalia argued that *Hendricks* had in fact interpreted the Sexually Violent Predator Act to require, not an inability to control behavior, but rather a likelihood that the offender would commit future acts of sexual violence.¹⁴³

139. *See id.* at 410–11.

140. *Id.* at 411.

141. *Id.* at 412–13 (citations omitted).

142. *Id.* at 415 (Scalia, J., dissenting).

143. Scalia stated:

Under our holding in *Hendricks*, a jury in an SVPA ['Sexually Violent Predator Act'] commitment case would be required to find, beyond a reasonable doubt, (1) that the person previously convicted of one of the enumerated sexual offenses is suffering from a mental abnormality or personality disorder, and (2) that this condition renders him likely to commit future acts of sexual violence. Both of these findings are coherent, and (with the assistance of expert testimony) well within the capacity of a normal jury. Today's opinion says that the Constitution requires the addition of a third finding: (3) that the subject suffers from an inability to control behavior

Id. at 422–23.

The interpretation Scalia was arguing for would indeed be an enlargement of the legislature's power to detain dangerous people. After all, as the majority pointed out, if a likelihood of committing violent crimes was sufficient for indefinite detention under the Act, many in the ordinary prison population would be subject to indefinite detention.¹⁴⁴ If that were the test, then detention under the statute might become a mechanism for retribution or deterrence—in other words, for punishment under another name.¹⁴⁵ Under that interpretation, indefinite detention of enemy combatants and terrorists would indeed have to be considered constitutional. But the Court rejected Scalia's interpretation. Indefinite detention is permissible in the presence of an inability of a sexual predator to control his behavior.¹⁴⁶ The Court acknowledged that the notion of a lack of control presented conceptual problems, and that in particular it overlapped with difficulties in the ability to appreciate the nature of one's actions:

[W]e did not [in *Hendricks*] give to the phrase “lack of control” a particularly narrow or technical meaning. And we recognize that in cases where lack of control is at issue, “inability to control behavior” will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.¹⁴⁷

Under this decision, then, the mere existence of a personality disorder, together with a tendency to commit sexually violent crimes, is not sufficient to justify detention. *A fortiori* the mere tendency to commit such crimes will also not be enough to justify detention.

144. *Id.* at 412 (majority opinion).

145. *Id.* at 413 (citing *Kansas v. Hendricks*, 521 U.S. 346, 372–73 (1997) (Kennedy, J., concurring)).

146. *Id.*

147. *Id.* (citations omitted).

F. Hamdi, Padilla, Rasul, and the Detention of Unlawful Combatants

Certain older cases come up repeatedly in the current discussion of the detention of enemy combatants who are citizens: *Ex parte Milligan*,¹⁴⁸ *Moyer v. Peabody*,¹⁴⁹ *Ex parte Quirin*,¹⁵⁰ *Hirabayashi v. United States*,¹⁵¹ *Korematsu v. United States*.¹⁵² Of all these cases, the only ones to rely upon a government power to detain indefinitely without a civil or military trial are the last two, *Hirabayashi* and *Korematsu*.¹⁵³ While still on the books as good law, these two cases have been so thoroughly discredited that reliance upon them would be an embarrassment.¹⁵⁴

Nevertheless, in the recent *Hamdi* case (and also in the *Padilla* and *Rasul* cases), the government asserted the right to detain enemy combatants indefinitely without either a civil or military trial.¹⁵⁵ In trying to find support for the broad powers the government sought, the federal district court in the *Padilla* case turned to the power

148. 71 U.S. (4 Wall.) 2 (1866).

149. 212 U.S. 78 (1909).

150. 317 U.S. 1 (1942) (per curiam).

151. 320 U.S. 81 (1943).

152. 323 U.S. 214 (1944).

153. In *Milligan*, the Court rejected the use of a military tribunal, while the civil courts were open and operating, for a civilian citizen accused of aiding the enemy. 71 U.S. (4 Wall.) at 121–22, 127. In *Moyer* the detention of a union leader by the Governor of Colorado during what was labeled an “insurrection” was conceded to be temporary; it lasted only for two and a half months. 212 U.S. at 82–85. In *Quirin*, the defendants, German soldiers who arrived in the United States by way of submarine and whose mission was sabotage, were given a military trial. 317 U.S. at 20–22. *Quirin* has its own problems. It was decided hastily, affirming the right of the government to try the defendants before a military tribunal, with a reasoned opinion handed down only after the defendants had been executed. David J. Danelski, *The Saboteur’s Case*, 1 J. SUP. CT. HIST. 61, 71 (1996). By the time of the later opinion, it was clear that not all the justices were happy with what they had done. *Id.* at 79–80. Some years later Justice Frankfurter said that the *Quirin* experience was “not a happy precedent.” *Id.* at 80. Commenting on *Quirin*, Justice Douglas said: “[I]t is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds . . . is made, sometimes those grounds crumble.” *Id.* at 77 (alteration in original) (quoting Transcription of interviews of William O. Douglas, by Walter F. Murphey, 204–05, Seely G. Mudd Manuscript Library, Princeton University, Princeton, N.J.).

154. See *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) (overturning *Korematsu*’s conviction on the facts of the case).

In *Hirabayashi v. United States*, 627 F. Supp. 1445, 1447 (W.D. Wash. 1986) and *Hirabayashi v. United States*, 828 F.2d 591, 608 (9th Cir. 1987), *Hirabayashi*’s convictions were also overturned. In 1988 Congress issued an official apology to Japanese Americans who were detained during the war. See 50 U.S.C. app. § 1989a (2000).

155. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2639 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2716 n.5 (2004); *Rasul v. Bush*, 124 S. Ct. 2689, 2693 (2004) (stating that the government argues that habeas only applies on American soil).

recently carved out from *Salerno* through *Zadvydas*, and that takes us back to the beginning of our story.¹⁵⁶

One of the premises upon which the government's brief in the *Hamdi* case is based was that the *Congress* had authorized the President to hold these prisoners indefinitely.¹⁵⁷ The Constitution, of course, authorizes Congress to suspend the writ of habeas corpus¹⁵⁸ for the public safety during a period of "rebellion or invasion." And the Constitution speaks in some detail to the protections that are to be provided to criminal defendants.¹⁵⁹ But the Constitution nowhere explicitly authorizes either the Congress or the President to suspend the right to a criminal trial without suspending habeas corpus and to hold people alleged to be dangerous for an indefinite period of time.

Does the Constitution *implicitly* permit Congress to order the indefinite detention of those who (unlike the mentally ill) are responsible for what they do, and who have not been convicted of a crime or given prisoner of war status? Does it, in particular, permit Congress to order indefinite detention in cases of "terrorism and other special circumstances" mentioned in *Zadvydas*?¹⁶⁰ If it does not, then it certainly doesn't permit Congress to order such detention without a hearing, which is precisely what the government was claiming was permitted.¹⁶¹ Yet none of the courts that considered the matter in these recent cases, save the district court in the *Padilla* case, questioned the assumption that Congress did have that general power.¹⁶² In *Hamdi*, it is true, the plurality asserted in dictum that indefinite detention *for interrogation* had not been authorized by Congress.¹⁶³ But the justifying purpose of detention in these cases, the Court said, was to keep the detainees away from the combat zone,¹⁶⁴ and the fact that Congress had not authorized indefinite detention for interrogation says nothing about whether Congress had

156. See *supra* Part I.A.-D.

157. *Hamdi*, 124 S. Ct. at 2639.

158. U.S. CONST. art. I, § 9, cl. 2.

159. U.S. CONST. art. I, § 9, cl. 3; art. III, § 2, cl. 3; art. III, § 3, cls. 1, 2; amends. IV, V, VI, VIII.

160. See *supra* notes 131-32 and accompanying text.

161. *Hamdi*, 124 S. Ct. at 2642-44.

162. Indeed, in *Hamdi* the only question of due process the Court thought worth raising was the question of procedural due process: What sort of a hearing would be appropriate in these circumstances? The answer to that, the Court said, was determined by applying the balancing test laid down in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Hamdi*, 124 S. Ct. at 1246-50.

163. *Hamdi*, 124 S. Ct. at 2641.

164. *Id.* at 2640. The detention in *Moyer* was for some three months. *Moyer v. Peabody*, 212 U.S. 78, 82-83 (1909).

authorized—and more importantly for our investigation here, about whether Congress *could* authorize—indefinite detention for any purpose.

In *Padilla*, Judge Mukasey put the question this way: is the “indefinite confinement of one not convicted of a crime *per se* unconstitutional?”¹⁶⁵ He answered that question in the negative, and he supported that answer by running briefly through the cases from *Salerno* to *Zadvydas*, throwing in *Moyer* for good measure.¹⁶⁶ But *Moyer* is not about *indefinite* detention. The only support for the proposition that indefinite detention is permissible comes from the line of modern cases going back barely sixteen years.¹⁶⁷

The import of these cases, as we have seen, is not clear. *Salerno* makes a point of the brevity of the detention at issue.¹⁶⁸ Two of the cases, *Foucha* and *Zadvydas*, actually reject indefinite detention, the first for insanity acquittees who have regained their sanity,¹⁶⁹ the second for undesirable aliens.¹⁷⁰ The only case to authorize indefinite detention under the *Salerno* reasoning is *Hendricks*, and the message of *Hendricks* was clarified in *Crane* to apply only where there is sufficient mental abnormality to call the detainee’s responsibility and control into question.¹⁷¹ *Zadvydas* left open the question of the indefinite detention of terrorists.¹⁷²

Given all that, it seems to me that there is plenty of room left to reach the conclusion that Congress does not have the power to order the indefinite detention of those who are responsible for what they do and who have not been convicted of any crime. In the next Part of the Article I will argue for that conclusion on moral and political grounds, and in the third Part of the Article, I will argue that that conclusion is consistent with Supreme Court precedent.

II. JUSTIFYING INDEFINITE DETENTION

One way of looking at what the Court did in *Hendricks* and *Crane* was that it drew the following line: no one who understands what he is doing may be indefinitely detained unless he is

165. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 591 (S.D.N.Y. 2002), *aff’d in part, rev’d in part sub nom. Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev’d*, 542 U.S. 426, 124 S. Ct. 2633 (2004).

166. *Id.*

167. *See supra* Parts I.A.–I.E.

168. *See supra* note 66 and accompanying text.

169. *See supra* notes 41–42 and accompanying text.

170. *See supra* note 45 and accompanying text.

171. *See supra* notes 47–48 and accompanying text.

172. *See supra* note 131 and accompanying text.

substantially unable to control his behavior. That seems like a plausible rule, but it has given rise to a great deal of controversy.¹⁷³ To understand why, we have to know something about the recent history of the theory of criminal responsibility.

A. *The Return of the Man Who Could Not Control His Behavior*

When are we entitled to give up on deterrence and resort to physical restraint to prevent future harm? One traditional answer is: in cases of insanity. If a severe mental disorder that satisfies the legal definition of insanity can be established, we abandon punishment and choose commitment.¹⁷⁴ Both punishment and the threat of punishment are ineffective, and where the individual presents a serious danger, only indefinite detention can be counted on to satisfy the state's obligation to prevent harm.¹⁷⁵ Moreover, the person whose criminal act is due to his insanity does not deserve punishment, even though he may have to be detained indefinitely for the protection of society. About these things there is very little controversy.¹⁷⁶

But although there is not much controversy about the relationship between insanity, punishment, and indefinite detention, there has been a great deal of controversy about just what constitutes legal insanity. The traditional discussion contemplates two different sorts of disability stemming from mental illness: a disability that interferes with understanding and appreciation of the consequences of one's actions, as may happen, for example, in schizophrenia, and a disability that interferes with control over behavior, as may happen

173. See *infra* notes 180–81 and accompanying text.

174. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 161 (J.H. Burns & H.L.A. Hart eds., 1970).

175. This observation is not based on utilitarian reasoning, though it is based on a kind of consequentialism. Bentham argued that punishment of those who could not be deterred was pointless. See *id.* Hart made the obvious *ad hominem* criticism that it might promote welfare nevertheless to punish the insane and others because of the deterrent effect it would have on others. See H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 1, 19 (1st ed. 1968). I believe, as many others do, that utilitarianism has been completely discredited as a theory of punishment. The point I am making here is that if punishment has any justification at all, it cannot be based upon the deterrence of others, but it must be based upon the effect punishment has on the person punished. Hence if it can have no effect on that person, it is pointless. For a criticism of both utilitarianism and retributivism, see Michael Corrado, *Abolition of Punishment*, 35 SUFFOLK U. L. REV. 257, 262–70 (2001).

176. See MODEL PENAL CODE § 4.01(1) (1985). To say that there is very little controversy is not to say there is none. A small number of states have abolished the insanity defense. See IDAHO CODE ANN. § 18-207(1) (2004); KAN. STAT. ANN. § 22-3220 (1995); UTAH CODE ANN. § 76-2-305 (2003).

with compulsive disorders.¹⁷⁷ In the latter years of the twentieth century, the second sort of disability, the control or volitional disability, was subjected to vigorous criticism, and the idea that a rational actor might lack control over his behavior aroused strong opposition, both theoretical and political.¹⁷⁸ The theoretical argument was, first, that the very idea of someone who acted intentionally and yet whose act was not in his control did not make sense: to act intentionally was to will the act; to will the act was to act voluntarily; to act voluntarily was to be in control.¹⁷⁹ That argument was bolstered by a second argument, to the effect that even if there were cases in which a rational agent couldn't control his behavior, it was impossible to distinguish between those who *couldn't* and those who *wouldn't* control their behavior.¹⁸⁰

Both arguments were unsound,¹⁸¹ but they were tremendously influential, supported as they were by political sentiment from the left and right. Indeed, in the 1980s, the man who could not adequately control his behavior and who had great difficulty in conforming his behavior to the law was well on his way to becoming the Invisible Man of American law. In the years between 1980 and 2000, the number of states that recognized the second element of responsibility,

177. 21 AM. JUR. 2D *Criminal Law* § 49 (1998) (discussing the theory underlying the principle of the insanity defense).

178. The attack on the control element was just part of a general attack on the insanity defense:

During the last ten years, interest in abolishing or modifying the insanity defense has been renewed because of several factors. Public officials, speaking for a growing conservative consensus and a public understandably disturbed by the failures of the entire criminal justice system, have championed the cause that the insanity defense is one more indication that the country is "soft on crime."

Insanity Defense Work Group, *American Psychiatric Association, Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 682 (1983).

179. See, e.g., Michael Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1128-48 (1985) (identifying volition with control); Stephen Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1593-94 (1994) (same).

180. See Insanity Defense Work Group, *supra* note 178, at 685. This is the source of the quote, repeated frequently and often mindlessly in the literature, to the effect that "[t]he line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk." This comes in the face of studies showing that in some cases the line is very clear indeed. See, e.g., Committee on Addictions of the Group for the Advancement of Psychiatry, *Responsibility and Choice in Addiction*, 53 PSYCHIATRIC SERVICES 707, 708-09 (2002) (discussing biological and psychological studies of addiction).

181. See Michael Corrado, *Responsibility and Control*, 34 HOFSTRA L. REV. (forthcoming 2005).

the control element, decreased.¹⁸² Where in 1980 thirty states had recognized both the cognitive and the control elements of the insanity defense, now only fifteen do.¹⁸³ The remaining states either recognize only a cognitive element or provide no insanity defense whatsoever.¹⁸⁴ Sympathy for an addiction defense went the same way, for the same reasons.¹⁸⁵ The basis for an addiction defense is the claim that the addict cannot fully control his addictive behavior. If control difficulties make no sense, then neither does an addiction defense.¹⁸⁶

But although he has been losing his role in the insanity defense and other excuses, the man who cannot adequately control his actions is no longer invisible. He has reappeared in the sexual predator legislation (and other arenas),¹⁸⁷ where he can be both punished and

182. See Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1, 45 (1988); Christine Michalopoulos, Comment, *Filling in the Holes of the Insanity Defense: The Andrea Yates Case and the Need for a New Prong*, 10 VA. J. SOC. POL'Y & L. 383, 389 (2003).

183. The fifteen are: Arkansas, Connecticut, Hawaii, Kentucky, Maryland, Massachusetts, Michigan, New Mexico, Oregon, Rhode Island, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. See ARK. CODE ANN. § 5-2-312 (1997 & Supp. 2005); CONN. GEN. STAT. ANN. § 53a-13 (West 2001); HAW. REV. STAT. § 704-400 (1993); KY. REV. STAT. ANN. § 504.020 (LexisNexis 1999); MD. CODE ANN., CRIM. PRO. § 3-109 (LexisNexis 2001); MICH. COMP. LAWS ANN. § 768.21a(1) (West 2000); N.M. STAT. § 31-9-3 (2000); OR. REV. STAT. § 161.295 (1997); VT. STAT. ANN. tit. 13, § 4801 (1998); WIS. STAT. ANN. § 971.15 (West 1998); WYO. STAT. ANN. § 7-11-304 (2005); Commonwealth v. McHoul, 226 N.E.2d 556, 557 (Mass. 1967); State v. Johnson, 399 A.2d 469, 476 (R.I. 1979); Price v. Commonwealth, 323 S.E.2d 106, 109 (Va. 1984); State v. Nuckolls, 273 S.E.2d 87, 89 (W. Va. 1980).

184. Under New Hampshire law there is no test for insanity; the defendant's sanity is a question of fact just like any other fact for the jury to consider. See State v. Abbott, 503 A.2d 791, 794 (N.H. 1985); State v. Sadvari, 462 A.2d 102, 104-05 (N.H. 1983); see also *supra* note 103.

185. See United States v. Moore, 486 F.2d 1139 (D.C. Cir. 1973) (en banc) (rejecting common law defense of addiction). See generally Michael Corrado, *Addiction and Responsibility: An Introduction*, 18 LAW & PHIL. 579 (1999) (outlining questions of addiction and responsibility).

186. See Michael Corrado, *Addiction and Causation*, 37 SAN DIEGO L. REV. 913, 929-35 (2000).

187. I am thinking here of the guilty-but-mentally-ill ("GBMI") verdict available in a number of states. This verdict often results, just as with the sexual predator legislation, in punishment followed by indefinite detention. In some states the basis for the GBMI verdict is a compulsive or control disorder. For example, it is the law in Delaware that:

Where the trier of fact determines that, at the time of the conduct charged, a defendant suffered from a psychiatric disorder which substantially disturbed such person's thinking, feeling or behavior and/or that such psychiatric disorder left such person with insufficient willpower to choose whether the person would do the act or refrain from doing it, although physically capable, the trier of fact shall return a verdict of "guilty, but mentally ill."

DEL. CODE ANN. tit. 11, § 401(b) (2001).

then preventively detained. His reappearance has elicited two very different responses from those who wanted him gone. One response is this: since the man who cannot control his behavior doesn't exist (or at least cannot be detected if he does exist), the sexual predator legislation is a mistake.¹⁸⁸ The sexual offender's acts are intentional, and therefore, he is in control.¹⁸⁹ If he is capable of understanding what he is doing (that is, if he is not legally insane), he should be punished and not detained.¹⁹⁰ Another response is this: although the man who *cannot* control his behavior may not exist, the man who *will* not control his behavior certainly does, and detention of the sort provided for in the sexual predator legislation may be appropriate for those who will not conform to the law—including terrorists.¹⁹¹

I have argued elsewhere that the underlying premise shared by these two arguments, the premise that there is no distinction to be made between the person who cannot conform to the law and the person who will not conform to the law, is false.¹⁹² But even if I am right and that premise is false, it doesn't follow that the conclusions that they reach must be rejected. For even if there are rational people who cannot control their behavior, or who experience unreasonable difficulty in trying to conform their behavior to the law (to avoid sexually violent behavior, for example), it might still be appropriate to punish such people when they do break the law, rather than detaining them indefinitely. Or, on the other hand, it might be the case that their lack of control is not a defining factor with legal significance, and that anyone who refuses to be deterred by the threat of punishment should be subject to indefinite detention. But although I do not think the falsity of these conclusions follows from the falsity of the premise, these conclusions are false nevertheless.

In South Carolina:

A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong . . . , but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

S.C. CODE ANN. § 17-24-20(A) (2003). Other states distinguish this verdict from the NGRI verdict by the lesser degree of disability required. In jurisdictions where the only legal basis for an insanity acquittal is cognitive disability, that means that individuals with recognized compulsive disorders will end up guilty but mentally ill. See ILL. COMP. STAT. ANN. 5/6-2(c) (West 2002).

188. See Stephen Morse, *Fear of Danger, Flight from Culpability*, 4 PSYCHOL. PUB. POL'Y & L. 250, 258 (1998).

189. See *id.*

190. See *id.*

191. See Slobogin, *supra* note 26, *passim*.

192. See *infra* Part II.C.

Starting from the assumption that the man who cannot control his behavior *does* exist, I will argue first that if he creates a serious danger to the community he should be detained and not punished. I will then argue that such detention should be limited to those who cannot control their behavior.

B. Punishing the Man Who Could Not Control His Behavior

If we start from the premises that it *is* possible for a person who understands what he is doing to nevertheless lack control, and that it is possible to distinguish that person from one who simply refuses to comply, then the first position to be considered is that those who find it difficult to control their behavior should be punished and not indefinitely detained. It is difficult to understand why that should be so. Assuming that punishment cannot be fully justified in terms of making an example for others,¹⁹³ in the case of the offender who cannot control his behavior, punishment is a pointless infliction of pain.¹⁹⁴ He cannot mend his ways. And so where serious crimes are an issue, detention (and rehabilitation where possible) seems the only alternative. If the only thing in favor of punishing and not detaining those with control difficulties was the flimsy argument against the possibility of control difficulties, it would be difficult to see why that position has attracted the support it has.¹⁹⁵

The real force of the argument against detention is in its humanitarian appeal, and it is easiest to understand its bite when speaking about addiction. To treat the compulsive or the addict as undeterrable, to deny him his responsibility for his actions, it is argued, is to treat him as a machine and to condemn him to the misery of a rehabilitative repair shop for an indefinite period of time, perhaps for the rest of his life.¹⁹⁶ The message to the addict is that he cannot free himself from his addiction. In other words, the denial of responsibility is self-fulfilling. Someone who is told that he is not responsible for the mess he is in and who is treated like someone who is not responsible will lose his will to take responsibility. Paternalism makes children of us. The addict and anyone suffering from compulsive difficulties are entitled to the respect that is implicit in the threat of punishment: "You are capable of handling your own affairs, and since you are, you will be held accountable and punished if you

193. See *supra* note 175.

194. I assume as well that punishment cannot be justified in terms of retribution.

195. See Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 779, 815-16 (1985).

196. See Slobogin, *supra* note 26, at 27.

handle them in such a way as to harm others." In other words, we want to salvage responsibility where possible, and we cannot do that by treating people as if they are not responsible.

The argument has a lofty tone, but it falls apart under analysis. It is true that the person suffering from a compulsive disorder has a certain amount of control over his life and a certain amount of responsibility for what is happening to him. The addict could, to begin with, have avoided taking the drug that has become his addiction. And now that he is addicted, he could voluntarily enter a rehabilitation program. That is something that remains within his control, so that he may be threatened with punishment if he fails to enter such a program. (And the compulsive sex offender could voluntarily have sought psychological rehabilitation.) But avoiding taking the drug the first time is not what is at issue here and neither is entering a rehabilitation program. If in fact there is social harm in the taking of certain drugs, then those who are not yet addicted but take those drugs can be punished for it. Moreover, even the addict or the compulsive offender can be required to seek rehabilitation under threat of punishment. The question is whether society can best be protected from the dangers presented by a person suffering from a compulsive disorder by holding him responsible for the compulsive behavior itself (rather than for becoming compulsive or for failing to seek rehabilitation) and by punishing the symptoms of the compulsion. The question is whether he can be held responsible for his compulsive behavior itself and whether it serves any purpose to threaten him with punishment if he engages in it. And it seems perfectly clear that it serves no purpose whatsoever. Neither the threat of punishment, nor punishment itself, works very well in preventing the addict or compulsive offender from engaging in his addictive or compulsive behavior. Indeed, punishment without treatment—which is really what is called for by this point of view—is the truly inhumane response to addiction or any other control disorder.

Of course, detention is not always the appropriate response either. What may be appropriate for a compulsive sex offender, whose crimes threaten harm to others, need not be appropriate for an addict whose crimes are the much less serious crimes of possession and use. While detention may be called for in some cases, in others clinical treatment may be enough, and in some no intervention at all may be appropriate. Some crimes associated with addictive substances may be violent crimes, and of course they may be punished, just as failure to enter rehabilitation may be punished. But

the proper response to crimes involving simple addictive behavior is generally either a paternalistic response, or no response at all. It does not demean the addict to be required to undergo treatment any more than it demeans the person with a communicable disease to be quarantined. If the taking of addictive drugs is a threat to society—and it is difficult to know whether the taking of the drugs or their prohibition is a greater threat to the peace—then the community is entitled to take action to prevent it. And that action may include the involuntary treatment of addicts.

All of this can be applied to the compulsive sex offender. If in fact there are offenders who genuinely find great difficulty in controlling their criminal behavior, then the warnings against paternalism are misdirected. The state has an obligation to protect, and *if* we are dealing with people who cannot control their behavior, neither the threat of punishment, nor punishment itself, are going to have any effect. The question of course is whether there are sex offenders who cannot control their behavior, but once we have put aside the theoretical arguments against the possibility of such a disability, we must rely on the judgment of those whose business it is to determine these things: psychiatrists, psychologists, and other behavioral scientists. It makes no sense to close our eyes to the problem and insist on punishing those who cannot benefit from the punishment.

And so it would seem that the Supreme Court is right to permit indefinite detention of those violent offenders who cannot control their behavior. Where it has gone wrong is in permitting the punishment of such people *before* they are committed for detention. If we are willing to recognize the man who cannot control his behavior, the arguments against according him a responsibility defense fall flat. There is a very clear position here: if punishment is pointless, then it is inhumane to punish. What now needs to be shown is the converse: where a person can control his behavior, detention is inappropriate.

C. *Detaining the Man Who Can Control His Behavior*

The question of enemy combatants raises the general issue of the offender who *can* control his behavior. If we are justified in detaining those who cannot control their behavior, why not those who can but choose not to? That is, why not detain anyone who is undeterrable and who threatens serious harm? For example, why isn't indefinite detention appropriate for the terrorist or the unlawful combatant? The suicide bomber is the paradigm example of an undeterrable

person. If his prospective death will not stop the bomber, why would the threat of punishment? Certainly he is undeterrable if anyone is, even though we may assume that he is not suffering from a cognitive defect that would mean legal insanity, or from an inability to control his behavior. Why not simply detain him indefinitely until it can be established that he is no longer dangerous? There are three sorts of problems with this position.

The first problem is that if we are willing to detain those who will not conform to the law, it is impossible to know where to draw the line between those who should be detained and those who should be punished. If we do not accept the difference between those who *cannot* conform to the law and those who *will not* conform to the law, it becomes difficult to see where the line between punishment and detention should be drawn. How are we to decide who cannot be deterred, in the sense that would justify indefinite detention? The problem is to define the locution "will not be deterred" or "will not conform to the law" in such a way as to yield a clear line between those who may be detained and those who may not. Every criminal takes a chance that he will be apprehended and punished. How great must the chance be before he moves from the category of the punishable and into the category of the detainable? The punishments that are risked by criminals are sometimes very substantial indeed. In those cases, how great must the risk be before it is significant? Using the standards of the criminal law, we would have to say that causing a twenty percent chance of death or of life imprisonment would be more than reckless, it would be something close to depraved-heart indifference. Is that a great enough risk to permit us to identify someone as undeterrable? Should every criminal who is willing to risk a twenty percent chance of apprehension and conviction be subject to indefinite detention?¹⁹⁷ The problem is not so much coming up with the right figures as it is explaining why those a bit on one side of the line should be subject to punishment only, while those a bit on the other side should be subject to indefinite detention. Whatever it is that distinguishes the punishable from the detainable, it can't be something that fades and disappears as the actor's tolerance for risk edges up a bit.

The second problem is that giving the state the power to detain those who simply will not obey the law opens the way to serious

197. And what should we say about the person who, when provoked severely enough, will disregard a high risk of punishment? The criminal justice system that we have *mitigates* his punishment. Should he be indefinitely detained instead? Detained only when he is provoked?

abuse. Suppose that judges have the option of preventively detaining anyone who cannot be deterred by a significant threat of substantial punishment. A member of a minority political party who has access to certain classified documents makes them available to a newspaper. He is aware of the penalty that goes with revealing classified information and is willing to pay that price. The government argues that revealing the information he has revealed is a serious threat to national security, and will give aid and comfort to an enemy.¹⁹⁸ It argues that the offender has additional knowledge which could cause even more damage if revealed. It asks for preventive detention on the ground that the accused is dangerous, that the danger he is capable of creating is great, and that he obviously is not deterred by the threat of punishment. This possibility brings to mind the example of Mordecai Vanunu, the Israeli nuclear technician recently released from prison.¹⁹⁹ He served eighteen years, twelve in solitary confinement, for disclosing information about Israel's nuclear program; Israel now declines to allow him to leave the country or to talk to the press for a period of time, a deprivation of liberty less onerous than but similar to preventive detention.²⁰⁰

The third problem, having to do with the case of unlawful combatants in particular, is that none of the arguments for preventive detention are convincing in that case. There might indeed be a serious threat to the community in what the protestor has done, and perhaps he is capable of causing even greater harm. The problem here is that putting the power to detain indefinitely in the government's hands creates a conflict of interest. The question will always be whether the government is detaining the individual because he is a threat to the *community* or because he is a threat to the *government*, which of course is not the same thing. Where the government has the option of silencing those who protest by imposing indefinite detention upon them, at the same time creating an example for other protestors, the consequences are likely to be unfortunate.²⁰¹

198. It is important to keep in mind that the security of the state is considered even more important than human life. Treason, not murder, is the most serious of crimes. See *Hanauer v. Doane*, 79 U.S. (12 Wall.) 342, 347 (1871) ("No crime is greater than treason."). Perhaps a modern justification for the rule would be that when the survival of the state is threatened, the security of all is threatened.

199. Reuters, *Israeli Nuclear Whistleblower Released*, ABC NEWS ONLINE, Apr. 21, 2004, <http://www.abc.net.au/news/newsitems/s1092096.htm>.

200. *Id.*

201. Cesare Beccaria has some interesting things to say about the relative seriousness of crimes:

We are concerned here not only with individual invasions of liberty but with the effects of a *practice*, the practice of pure preventive detention. Even if the most rigorous effort is made to use detention only in the most serious cases, there will be a chilling effect at the essentially amorphous border between the serious and the not-so-serious. This is another reason, if one is needed, for not permitting preventive detention of those who can control their behavior but for political or moral reasons refuse to do so and who threaten to commit crimes. Whether the crime threatened is minor or serious, what we want is a relatively bright line, and I do not think that a bright line can be drawn around the class of those who are unwilling to obey the law. The state's power to *punish*, of course, is subject to the same sort of abuse and the same sort of ambiguity. That is precisely why it is girded about with so many constitutional protections, all of which fall away when we deal with regulatory detention.

Indefinite detention is sometimes called for, but we can and should make what we can of the notion of a lack of control, as the Court did in *Hendricks*²⁰² and *Crane*.²⁰³ Those who cannot control their behavior, like those who cannot understand or appreciate the consequences of their behavior, are both harder to deter and less deserving of punishment. Those who are able but unwilling to conform may be harder to deter, but they are deserving of punishment. Given the difficulty of drawing the line and the danger of abuse, those who are able but unwilling to conform, like the terrorist but also like the recidivist felon and the conscientious objector, should be punished and not preventively detained.²⁰⁴

D. *Detaining Enemy Combatants*

We have been talking so far about offenders against whom punishment is not effective because they cannot or will not be

The first class of crimes, which are the gravest because most injurious, are those known as crimes of lese majesty [high treason]. Only tyranny and ignorance, confounding the clearest terms and ideas, can apply this name and consequently the gravest punishment, to crimes of a different nature, thereby making men, on this as on a thousand other occasions, victims of a word. Every crime, even of a private nature, injures society, but it is not every crime that aims at its immediate destruction.

CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 68 (Henry Paolucci trans., Bobbs-Merrill 1963) (1764).

202. *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997).

203. *Kansas v. Crane*, 534 U.S. 407, 409 (2002).

204. *See supra* notes 198–201.

deterred. There is an additional consideration in the case of citizens who turn up as enemy combatants, whether ordinary prisoners of war, illegal combatants, war criminals, or terrorists. The argument that is made for detention in this case is that punishment is not effective for another reason, namely that where the courts are not operating or are not close at hand, and where justice must be administered by military commanders, the threat of punishment cannot be effective.²⁰⁵ Those who are captured, either soldiers who become prisoners of war or others who violate the rules of battle, will know that there is little chance that they can be tried on the spot. If the only alternative is to release them, they will be immune from punishment. Under such circumstances preventive detention seems unavoidable:

[T]he detention of enemy combatants serves at least two vital purposes. First, detention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies Second, detention in lieu of prosecution may relieve the burden on military commanders of litigating the circumstances of a capture halfway around the globe As the Supreme Court has recognized, “[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.”²⁰⁶

This argument does justify temporary detention, just as the inability of the police to conduct on-the-spot criminal trials justifies the apprehension and temporary detention of criminal suspects. But war does not make a good case for indefinite preventive detention. It would be hard to make the point that in wartime the threat of punishment is *permanently* ineffective. For the justification for detention lasts not as long as the war lasts, but only as long as the conditions that justify the detention last. As long as those conditions last, as long as military commanders cannot be distracted to conduct

205. See *infra* notes 206–07 and accompanying text.

206. *Hamdi v. Rumsfeld*, 316 F.3d 450, 465–66 (4th Cir. 2003) (alteration in original) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950)), *vacated*, 542 U.S. 507, 124 S. Ct. 2633 (2004); see also *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 125–27 (1866) (concerning the imposition of martial law and detention under the threat of civil war or invasion); see *Hamdi*, 316 F.3d at 465–66 (discussing preventing enemy combatants from fighting against the country and difficulties in litigation as the two main reasons for detention of enemy combatants); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640, 2647–48 (2004) (discussing the need to detain enemy combatants in wartime and the difficulties of litigation in wartime).

criminal trials of prisoners who, if released, would return to support the enemy, the cursory sort of hearing required by the Supreme Court in *Hamdi* will have to do.²⁰⁷ But once those conditions disappear and the justification for such treatment fades, those accused of crimes must be entitled to a trial and either convicted or released. For example, once camps for prisoners of war have been organized and staffed there should no longer be any excuse for failing to try those suspected of crimes, either in military or civilian courts. The rationale simply collapses.

It is important to emphasize that the *only* rationale for detention recognized by the courts in these cases has to do with the difficulty of conducting trials in wartime and the danger of releasing combatants to return to enemy lines. Prisoners of war will return to enemy lines if released, and so they should not be released until the war ends. But the one suspected of crimes will not return to enemy lines if tried. If he is tried and found not guilty and was in fact a combatant, he may continue to be held as a prisoner of war. There is simply nothing in all this to challenge the call for a *per se* ban on the *indefinite* detention of those who are in control of their behavior and are not convicted of crimes.

Thus, indefinite preventive detention should be available, at most, in those cases in which the offenders cannot be deterred: cases involving the legally insane; cases involving those suffering from serious and extremely contagious diseases, where the control of the spread of the disease is not within the detainees' control; and perhaps cases involving sexual predators, if in particular cases sexual predators are unable to control their behavior. But the list of those who are detainable does not include those captured in battle, either on the ground that they will not be deterred by the threat of punishment, or on the ground that the threat of punishment cannot be implemented in wartime.

The next question is whether these principles are consistent with Supreme Court jurisprudence on the matter, or whether Judge Mukasey is right and Congress may constitutionally authorize indefinite detention for enemy combatants.²⁰⁸

207. See *Hamdi*, 124 S. Ct. at 2651–52.

208. See *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 591 (S.D.N.Y. 2002), *aff'd in part, rev'd in part sub nom. Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426, 124 S. Ct. 2711 (2004).

III. CAN INDEFINITE DETENTION (OF ENEMY COMBATANTS) BE BANNED?

Indefinite detention on grounds of dangerousness, then, is permissible at most where the threat of punishment cannot be effective. That is, where it can be established to some degree of certainty that the dangerous person cannot respond to the threat of punishment either because she does not understand what she does, or because she is not in control of her behavior. It is not morally permissible to authorize indefinite detention in any and all cases that arouse public anxiety, and in particular, it is not permissible in the case of combatants captured in time of war, whether they are simply prisoners of war or can also be accused of having committed crimes. A brief survey of the cases will make clear that, in fact, this limiting principle is indeed consistent with the cases.

Salerno, of course, was the opening move in this series of cases.²⁰⁹ But one of the very features that made preventive detention easier to take in that case disqualifies it as precedent for indefinite detention. The detention was limited in duration.²¹⁰ It was designed for, and could only last for, the pretrial period: "The arrestee is entitled to a prompt detention hearing, and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act."²¹¹ Nothing whatever about the case suggests that Congress could have ordered indefinite detention on the basis of future dangerousness. But the possibility of indefinite detention did come up in the *Foucha* case.²¹²

When the Court took *Foucha*, *Salerno* was still fresh.²¹³ It was open to the Court at that point to extend the holding of the earlier case, and to find that the Louisiana statute was about regulation and not about punishment, and so was constitutionally valid. Instead the Court held that the indefinite scope of the detention turned it into punishment. As the Court said, since the detainee had not been convicted of a crime, he could not be punished.²¹⁴ It struck down the statute. We might object to the way the Court went about reaching the conclusion, treating the detention as punishment. Even though the detention was to be indefinite, that did not make it punishment,

209. See discussion *supra* Part I.A.

210. *United States v. Salerno*, 481 U.S. 739, 747 (1987).

211. *Id.*

212. *Foucha v. Louisiana*, 504 U.S. 71, 85 (1992); see discussion *supra* Part I.B.

213. *Foucha*, 504 U.S. at 81 (distinguishing *Salerno* because it involved pretrial detention).

214. *Id.* at 80.

and if it did, that would not be enough to justify the conclusion. Definitions and aphorisms cannot decide questions of this sort.

The better way to put what the Court did is this: it distinguished the detention of the mentally ill from the detention of those who are legally sane.²¹⁵ While Foucha was mentally ill, his indefinite detention was justified. When he became legally sane, holding him was not justified unless as punishment, and then only if Foucha had been convicted of a crime. Foucha was not a candidate for continued preventive detention. There was no reason to think that henceforward his behavior could not be effectively (though of course not absolutely) controlled by the threat of punishment.

However, the next case in the series, *Hendricks*, called that conclusion into question.²¹⁶ If those who are legally sane cannot be indefinitely detained to prevent future acts of violence, then the Kansas statute, which at one and the same time declared that sexual predators were not insane and provided for their indefinite detention, should also be held unconstitutional.²¹⁷ But the Court went the other way in *Hendricks* and upheld the detention.²¹⁸ It is clear enough why the Court decided as it did. Public distress would have turned to outrage if the Court had concluded that the state could not keep pedophiles and other violent sexual predators off the streets indefinitely. To have limited their detention to the period provided for in criminal statutes would simply have been very difficult for the Court. On the other hand, to declare that the "mental abnormalities" required by the statute deprived sexual predators of responsibility for their actions and placed them beyond the criminal law would also have provoked outrage.²¹⁹ Very few were willing to come to the defense of such criminals. They were indeed the "the vile and the worthless" of Representative Randolph's speech,²²⁰ and they smoothed the way for the first indefinite detention of sane individuals ever explicitly approved by the Court for the purpose of preventing future harm.

It is true that for the most part those detained under the Kansas statute are persons who have been convicted of a crime, but by the time their detention begins, they will have served their criminal sentences, and under other circumstances would be entitled to go

215. See *supra* Part I.B.

216. See *supra* Part I.C.

217. *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997).

218. *Id.* at 371.

219. See KAN. STAT. ANN. § 59-29a02(b) (1994).

220. 16 ANNALS OF CONG. 538 (1807); see *supra* note 31 and accompanying text.

free. Their continued confinement is not based on what they have done but on what they might do in the future. It is pure preventive detention, and it is for an indefinite period of time. Had *Foucha* been decided immediately after *Hendricks*, it might have come out differently. In fact, after *Hendricks* it was not entirely clear how much of *Foucha* was left standing.

Crane helped to clarify the picture.²²¹ The very issue in *Crane* was to come to an understanding of what *Hendricks* had said.²²² One possibility was to read *Hendricks* as giving a very broad scope to the Kansas statute. If the requirement of a “mental abnormality or personality disorder” was satisfied by any “condition,” whether genetic or acquired, which to a high degree “predisposes the person to commit sexually violent offenses,”²²³ then the requirement could be satisfied by almost any recidivist. The person who reoffends to “a degree constituting such person a menace to the health and safety of others” has a condition—that is, a tendency to reoffend—that “makes the person likely to engage in the predatory acts of sexual violence.”²²⁴ Justice Scalia, for example, appears to have read *Hendricks* in that way in his dissent in *Crane*.²²⁵

Another way to read *Hendricks* was as requiring a condition that resulted in a serious difficulty in controlling behavior, that is, a serious difficulty in refraining from committing crimes of a sexual nature. *Hendricks* had admitted that he had difficulties of that sort.²²⁶ *Crane* denied that he did.²²⁷ The statute itself said nothing of the sort;

221. *Kansas v. Crane*, 534 U.S. 407 (2002); see *supra* Part I.E.

222. See *Crane*, 534 U.S. at 409.

223. § 59-29a02(b).

224. *Id.*

225. Scalia stated:

Under our holding in *Hendricks*, a jury in an SVPA commitment case would be required to find, beyond a reasonable doubt, (1) that the person previously convicted of one of the enumerated sexual offenses is suffering from a mental abnormality or personality disorder, and (2) that this condition renders him likely to commit future acts of sexual violence. Both of these findings are coherent, and (with the assistance of expert testimony) well within the capacity of a normal jury. Today's opinion says that the Constitution requires the addition of a third finding: (3) that the subject suffers from an inability to control behavior—not utter inability, and not even inability in a particular constant degree, but rather inability in a degree that will vary in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself.

Crane, 534 U.S. at 422–23 (Scalia, J., dissenting) (citations omitted). Justice Thomas, who wrote the opinion in the *Hendricks* case, joined in Scalia's dissent. *Id.* at 415.

226. *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997).

227. *Crane*, 534 U.S. at 411, 414.

it only required a likelihood that the offender would engage in predatory acts. But the *Hendricks* opinion had plenty of language suggesting that the only way the statute could be found constitutional would be to read such a requirement into it. And that is the way the majority in *Crane* understood it.²²⁸

Under *Crane*, then, the sexual predator need not be insane to be indefinitely detained. But he must be unable to control, or at least must experience difficulty in controlling, his predatory behavior.²²⁹ Although this lack of control does not constitute insanity in Kansas and many other states, it fits nicely with the principle we are working with here. The person who cannot control his violent sexual behavior presents an unacceptable risk of causing serious harm, a risk that cannot be held within acceptable levels by the threat of punishment. To say that he cannot control his behavior is *tantamount* to saying that the threat of punishment cannot work.²³⁰

Zadvydas,²³¹ like *Foucha* and *Crane*, cut back on the state's power to detain.²³² Judge Mukasey, who wrote the district court opinion in the *Padilla* case, and whose point was to show that there was no constitutional ban on the indefinite detention of enemy combatants, distinguished *Zadvydas*:

The Court recently raised constitutional doubts as to the permissible length of preventive detention when it considered a case involving aliens awaiting deportation, and therefore, read the governing statute to limit such detention to the time reasonably necessary to secure the alien's removal, with six months presumed as a reasonable limit. However, even while doing so, the Court was careful to point out that the case before it did not involve "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."²³³

228. See *id.* at 412–13 (discussing the constitutional impact of *Hendricks*).

229. *Id.* at 413.

230. I have already suggested that the state's right to detain such individuals indefinitely *ought* to be inconsistent with the right to punish them. See *supra* note 175 and accompanying text. But on that point, the sexual predator cases point in a different direction.

231. 533 U.S. 678 (2001).

232. See *supra* Part I.D.

233. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 591 (S.D.N.Y. 2002) (quoting *Zadvydas*, 533 U.S. at 696), *aff'd in part, rev'd in part sub nom. Padilla v. Rumsfeld*, 352 F.3d 695, 724 (2d Cir. 2003), *rev'd*, 542 U.S. 426, 124 S. Ct. 2711 (2004).

The proper conclusion to draw from this, however, is only that *Zadvydas* did not prohibit indefinite detention of terrorists—which it could not have, in any case, since that issue was not before the Court.²³⁴ *Zadvydas* does not rule out indefinite detention, but neither does it support it. The one thing it does support is the conclusion that undesirable aliens cannot be indefinitely detained.²³⁵ We may understand that holding to be limited to cases where the behavior of such a person can be controlled by the threat of punishment, for it is clear that if he were found to be a sexual predator and unable to control his violent sexual behavior, or if he were acquitted of a criminal charge by reason of insanity, he would be a legitimate candidate for indefinite detention.

On the whole, then, the balance of precedent before *Hamdi* would seem to be against indefinite detention of anyone who retains his sanity and control over his behavior. At the same time, as *Zadvydas* makes clear, it is open to the Court to treat terrorism as a special circumstance.²³⁶ The *Hamdi* opinion itself is not as clear as we might have hoped.²³⁷ It did not rule out indefinite detention without conviction for a crime but neither did it explicitly affirm it. The Court addressed itself primarily to the question of procedural due process.²³⁸ If the Court had asked how long an enemy combatant may be held without *trial*, its answer would have been the answer to our question. If the Court had held that an enemy combatant could not be detained indefinitely without trial, then (since those who are tried and acquitted continue to be entitled to their freedom) those not convicted of a crime could not be held indefinitely. But that is not the question the Court set for itself. It asked, rather, how long an enemy combatant might be held without *process*.²³⁹ The Court decided that *Hamdi* could not be held indefinitely without process, but the process the Court required, as we have seen, was minimal, and did not amount to a trial.²⁴⁰

Beyond that the Court said only that Congress had not in fact authorized detention beyond the end of the Afghanistan war.²⁴¹ The Court's discussion of the meaning of indefinite detention suggests

234. *Zadvydas*, 533 U.S. at 696.

235. *See id.* at 699 (holding that once removal is not reasonably foreseeable, detention is not authorized by statute).

236. *See id.* at 682.

237. *See supra* notes 155–64 and accompanying text.

238. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2646–50 (2004).

239. *Id.* at 2635.

240. *See id.* at 2648.

241. *Id.* at 2641–42.

that the Court did not believe that Congress had in fact authorized indefinite detention, or that detention for the duration of the Afghanistan war was indefinite detention.²⁴² It noted that the war on terror might last “for two generations”²⁴³ and declared that for practical purposes that would be indefinite detention. It then decided that the detention could not last for the duration of the war on terror, but only for the duration of the war in Afghanistan.²⁴⁴ As to whether, if the war in Afghanistan were to go on for a very long time, the congressional authorization would permit detention for the full length of the war, the Court seems to have left that an open question:

[W]e understand Congress’ grant of authority . . . to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date.²⁴⁵

The opinion is not exactly clear about the point, but it is at least arguable that the Court believed that Congress did not, in the AUMF, authorize indefinite detention. What *is* clear, I think, is that the Court either believed that Congress had not authorized indefinite detention, or did not explicitly address the question at all.

The Court did say, as Dworkin points out, that “indefinite detention for the purpose of interrogation is not authorized.”²⁴⁶ There are three reasons why that may say nothing at all about the answer to our question. The first is that the Court might have meant that indefinite detention *without process* is not authorized for the purpose of interrogation, which seems very likely in the circumstances. Second, even if the claim was a substantive one—whether or not there is process, indefinite detention for the purpose of interrogation is not authorized—the Court may have been distinguishing the purpose of interrogation from the purpose of keeping Hamdi from rejoining enemy forces. Indefinite detention for purposes of interrogation is not authorized; but what about indefinite detention for the purpose of keeping Hamdi away from enemy lines? Again, the Court has nothing very clear to say at all. Third, even if

242. *See id.*

243. *Id.* at 2641.

244. *Id.* at 2642.

245. *Id.* at 2641–42.

246. *Id.* at 2641; Dworkin, *supra* note 4, at 29.

the Court had said explicitly that indefinite detention without conviction for a crime was not authorized by Congress, that would not have answered the question whether Congress had the power to authorize such detention, which, after all, is our question. On the other hand, if the Court had explicitly concluded that indefinite detention without conviction *was* authorized, then given that the Resolution was not struck down as unconstitutional that would entail that Congress did have that power under the Constitution. *Hamdi* leaves open, then, the question whether Congress might, under the Constitution, authorize indefinite preventive detention of enemy combatants.

As it is, the Court has so far said nothing inconsistent with the principle that where the threat of punishment is effective, indefinite detention is not justifiable. And it has said nothing to imply that in these circumstances the threat of punishment will be permanently ineffective. Captured combatants will fall into two categories. They will either be chargeable with some crime or they will not. If they are not chargeable with any crime, they are mere prisoners of war, and the Court recognized that under international law “[c]aptivity is neither a punishment nor an act of vengeance, but merely a temporary detention which is devoid of all penal character.”²⁴⁷ The period of detention is variable, but it is not indefinite, any more than pretrial detention is indefinite. It comes to an end when the war ends, however far off that might be. There is no reason to believe that when personal dangerousness is a condition of confinement, it need ever come to an end; in many cases it does not. In any case, however, the status of prisoners of war is a matter of international agreement and not of constitutional law.²⁴⁸

Those who are chargeable with or suspected of crimes are a different matter. They can be prevented “from returning to the field of battle and taking up arms once again”²⁴⁹ by trying them for their crimes and imprisoning them. To the Fourth Circuit’s objection that “the burden of litigating the circumstances of wartime captures halfway around the globe”²⁵⁰ justified detention without process, there are a number of obvious replies. First of all, the plaintiffs in

247. *Hamdi*, 124 S. Ct. at 2640 (citations omitted).

248. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 136; *Hamdi*, 124 S. Ct. at 2638 (noting that “the court likewise rejected Hamdi’s Geneva Convention claim, concluding that the convention is not self-executing and that, even if it were, it would not preclude the Executive from detaining Hamdi until the cessation of hostilities.” (citation omitted)).

249. *Hamdi*, 124 S. Ct. at 2640.

250. *Id.* at 2638.

Hamdi, *Padilla*, and *Rasul* are not being held on the field of battle. Although *Hamdi* and the *Rasul* plaintiffs were captured in Afghanistan, they are all, including *Padilla*, imprisoned in the United States or on territory controlled by the United States, none of which is a field of battle.²⁵¹ They are not halfway around the world.

But even if they were being held on the field of battle in Afghanistan, and even if the military could not reasonably be expected to carry the burden of litigating their cases, that does not justify *indefinite* detention. Should the war continue long enough, military tribunals can be arranged for. More importantly, as the facts in the three cases demonstrate, prisoners can be transported behind the lines to a secure area, perhaps even as far as South Carolina, where the civil courts are open and operating.

CONCLUSION

The issue is whether, under the Constitution, our government can authorize indefinite preventive detention solely on the basis of dangerousness. Ronald Dworkin has said that:

[T]he justices' arguments [in the *Hamdi* case] provide the legal basis for a much more powerful conclusion than the Court itself drew—that the Constitution does not permit the government to hold suspected enemy combatants or terrorists indefinitely without charging and convicting them of crimes . . . unless they are treated in effect as prisoners of war.²⁵²

There is nothing in that case that is even relevant to the question of constitutionality. Nevertheless the Court could decide as Dworkin would have them decide. Nothing in the opinion or in precedent forecloses that option. In particular, the cases cited by Judge Mukasey and discussed throughout this Article do not foreclose that option.

Should the Court go in that direction? Should the Court find indefinite detention of sane offenders unconstitutional? The argument has been made that even if indefinite detention is not generally authorized by the Constitution, terrorism and war create situations in which Congress and the Executive must be permitted to indefinitely detain dangerous people. I have argued on moral and political grounds that such detention is not desirable in the case of

251. *Id.* at 2633 (South Carolina); *Rumsfeld v. Padilla*, 124 S. Ct. at 2711, 1716 (2004) (South Carolina); *Rasul v. Bush*, 124 S. Ct. 2686, 2690 (2004) (Guantanamo Bay Naval Base, Cuba).

252. Dworkin, *supra* note 4, at 26.

those who are sane and in control of their behavior, whatever danger they present, and I have tried to show that that conclusion is consistent with our constitutional jurisprudence.

Salerno drove a wedge into the structure built out of habeas corpus, constitutional protections for the accused, and common law presumptions about innocence and detainability. The point is to find a way to stop the wedge before it shatters the structure. One way to stop it is to draw the line at indefinite detention of those who are either insane or unable to control their behavior.

